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INITIAL STATEMENT OF REASONS ADDENDUM

April 5, 2022

San Francisco Bay Conservation and Development Commission

Amendments to Commission Regulations, Title 14, Division 5, Chapter 13 (Enforcement Procedures) and Appendices H, I and New Appendix J

Introduction

On December 29, 2020, the San Francisco Bay Conservation and Development Commission ("Commission") issued a Notice of Proposed Rulemaking, an Initial Statement of Reasons, and proposed amendments to the Commission's enforcement procedures regulations that are codified at Title 14 of the California Code of Regulations, Division 5, Chapter 13 (14 C.C.R. §§ 11300-11386) and Appendices H and I, as well as a proposed Administrative Civil Penalty Policy that would be set forth in a new Appendix J. The public review and comment period on the proposed amendments commenced on December 29th and ran through February 18, 2021. In addition, the Commission held a public hearing on the proposed amendments at its February 18th meeting. On March 29, 2021, the Commission provided notice of an additional 15-day review period on certain revisions to the proposed amendments that were made in response to Commissioner comments. The Commission adopted the amendments, as revised, on April 15, 2021.

The Commission subsequently submitted the amendments as adopted and the complete rulemaking file to the Office of Administrative Law ("OAL") for OAL review pursuant to Government Code Section 11349.1. As a result of its review, OAL determined that certain revisions to the amendments are necessary and directed that an Initial Statement of Reasons Addendum ("ISR Addendum") be prepared to provide further information demonstrating that the amendments meet the standards established by Government Code Section 11349, particularly the standards of necessity and clarity.

This ISR Addendum describes the revisions to the amendments requested by OAL or made in response to OAL's comments and provides additional information to supplement the analyses set forth in the original Initial Statement of Reasons to demonstrate that the revised amendments meet the standards established by Government Code Section 11349. This ISR Addendum also presents a supplemental economic impact assessment and identifies the documents the Commission relied on in developing the amendments, including a State Auditor audit report and certain regulations or policies adopted by two other state agencies.

Purpose of Amendments and Rationale for Determination that the Amendments Are Necessary

The following analysis of the amendments, as revised in response to OAL's comments, supplements the section-by-section description of the amendments set forth in the Initial Statement of Reasons.

Section 11300. Grounds for the Issuance of Cease and Desist Orders

This section identifies the actions constituting grounds for the issuance of a Commission cease and desist order. The Commission original proposed to amend Section 11300 to change the word "shall" to "may" to reflect that the issuance of a cease and desist order is not mandatory if one of the identified actions occurs, but rather, is discretionary depending on the specific facts and circumstances of a particular case. However, the use of the word "may" would result in a clarity problem because it would create discretion without standards to prevent arbitrary application of such discretion. Moreover, properly read, this section describes any of the actions that "shall" constitute grounds for the issuance of a cease and desist order when the Commission issues such an order. Therefore, upon reconsideration, the Commission has determined that the originally proposed amendment to this section is not necessary and is hereby withdrawn.

Section 11301. Grounds for Permit Revocation

This section identifies the actions constituting grounds for complete or partial revocation of a Commission permit. As with Section 11300, the Commission originally proposed to amend Section 11301 to change the word "shall" to "may" to reflect that permit revocation is not mandatory if one of the identified actions occurs, but rather, is discretionary depending on the specific facts and circumstances of a particular case. For the reasons discussed above under Section 11300, upon reconsideration, the Commission has determined that the originally proposed amendment to this section is not necessary and is hereby withdrawn.

The amendment to the Authority and Reference note adding a Reference citation to Government Code Section 66638 is necessary because Section 66638 authorizes the Commission to issue a cease and desist order under the McAteer-Petris Act ("MPA") and provides authority for issuance of a permit revocation order to require any person who has violated a term or condition of a permit to cease such violations. The amendment adding a Reference citation to Government Code Section 66638 is also necessary to make the MPA and Suisun Marsh Preservation Act ("SMPA") Reference citations within this note consistent because Public Resources Code section 29601 (currently referenced) authorizes the Commission to issue a cease and desist order under the SMPA and provides authority for issuance of a permit revocation order to require any person who has violated a term or condition of a permit to cease such violations.

Section 11302. Grounds for the Imposition of Administrative Civil Liability

This section identifies the actions constituting grounds for the imposition of administrative civil liability. As with Sections 11300 and 11301, the Commission originally proposed to amend Section 11302 to change the word "shall" to "may" to reflect to reflect that the imposition of administrative civil liability is not mandatory if one of the identified actions occurs, but rather, is discretionary depending on the specific facts and circumstances of a particular case. For the reasons discussed above under Section 11300, upon reconsideration, the Commission has determined that this originally proposed amendment to Section 11302 is not necessary and, therefore, is hereby withdrawn.

Section 11310 -- Definitions

The amendment to subsection (b) is necessary to incorporate into the Commission's regulations the operative provisions of Commission Resolution 93-9, entitled "Establishing an Enforcement Committee, Setting Procedures, and Appointing Members." The amended definition of the term "enforcement committee" includes provisions added from Resolution 93-9 addressing the composition of the committee, quorum requirement, and selection of a chair, and provides that the committee shall conduct its hearings in accordance with the Commission's laws and regulations.

The amendment deleting existing subsection (d), which defines the term "hearing officer," is necessary because under the existing regulations, the earliest opportunity for the Commission to appoint a hearing office is when a particular enforcement matter comes before the Commission for decision. Appointing a hearing officer so late in the enforcement process is impractical, especially if the enforcement committee has already conducted a hearing in the matter. Moreover, in 1984, the Commission first established its enforcement committee, consisting of appointed commissioners, to conduct enforcement hearings and make recommendations to the Commission, and, to staff's knowledge, the Commission has never appointed a hearing officer for such purposes. For all these reasons, it is necessary to delete this subsection's definition of the term "hearing officer" and the numerous references in the regulations to an enforcement hearing possibly being conducted by a hearing officer. To preserve the option for the Commission to refer matters to a hearing officer, the amendments add subsection 11320(b), discussed below, stating that the Commission may appoint a hearing officer to conduct an investigation or hearing at the request of the Executive Director or chair of the enforcement committee or on its own initiative.

The amendment adding new subsection (f) is necessary to define the term "significant harm to the Bay's resources or to existing or future public access," as recommended by California State Auditor in its Audit Report No. 2018-120, released in May 2019, which focused on improvements to the Commission's enforcement program. The term "significant harm to the Bay's resources or to existing or future public access" is currently used in the standardized fines regulation (14 C.C.R. § 11386) to identify violations that are not suitable for resolution through the standardized fines process. In addition, as discussed below, the amendment to subsection 11321(a) adds the term "significant harm to the Bay's resources or to existing or future public access" to that subsection to identify violations that are to be resolved through Commission enforcement proceedings. The definition will determine the appropriate enforcement response to be commenced by the Executive Director for a violation. The definition consists of two components; whether a violation has resulted in "significant harm to the Bay's resources or to existing or future public access" will be determined based on both: (1) the context and (2) intensity of the violation.

The amendment adding new subsection (f)(1) is necessary to establish the standard, under the proposed definition of "significant harm to the Bay's resources or to existing or future public access," that "context" refers to the location of the violation and the characteristics of the area where it occurs.

The amendment adding new subsection (f)(2) is necessary to establish the standard, under the proposed definition of "significant harm to the Bay's resources or to existing or future public access," that "intensity" refers to the severity of the impact and the degree to which it affects the environment or public access.

The amendment adding new subsection (f)(3) is necessary to establish the standard, under the proposed definition of "significant harm to the Bay's resources or to existing or future public access," that where multiple violations are alleged, if a single violation results in harm that is individually limited but cumulatively significant when added to other violations, it shall be determined that the violation has resulted significant harm to the Bay's resources or to existing or future pubic access.

Section 11320 – Staff Investigation and Discovery

The amendment adding new subsection (b) is necessary to state that the Commission may appoint a hearing officer to conduct an investigation or hold a hearing, as authorized by Government Code Section 66643, at the request of the Executive Director or chair of the enforcement committee or on its own initiative. This amendment is also necessary to establish that a hearing officer holding an enforcement hearing shall do so in accordance with the procedural requirements of regulation Section 11327 and shall adopt a recommended enforcement decision in accordance with regulation Section 11330.

Section 11321 -- Commencing Commission Enforcement Proceedings

The amendment to subsection (a) is necessary to provide clarity and consistency for the exercise of the Executive Director's enforcement discretion in determining whether to commence Commission enforcement proceedings in response to a violation. In contrast to the existing language which simply provides that the Executive Director shall commence Commission enforcement proceedings whenever he or she believes that the results of an enforcement investigation so warrant, the amendment provides that the Executive Director shall commence Commission enforcement proceedings whenever he or she believes, as the results of an enforcement investigation, that any person has caused or threatens to cause significant harm to the Bay's resources or to existing or future public access, or that the nature, circumstances, extent, and gravity of the violation or violations so warrant. As noted above, the amendment incorporates the term "significant harm to the Bay's resources or to existing or future public access" as defined in subsection 11310(f).

The amendment to subsection (b) is necessary to provide clarity regarding the specific documents on which the Commission staff relies to make a prima facie case of alleged violations and to expedite providing copies of all such documents to a respondent. The amendment achieves this objective by requiring that, rather than a violation report and/or complaint for administrative civil liability ("complaint") referring to a list of documents (as under the existing regulation text), copies of all such documents shall be attached to or accompany the violation report or complaint or shall be provided to the respondent in electronic format upon request.

The amendment to subsection (c) is necessary to provide that upon written consent of the respondent or a respondent's authorized representative, a violation report or complaint shall be mailed to the respondent or the respondent's authorized representative by email. There is no statutory requirement for mailing a violation report to a respondent in a particular manner. Government Code Section 66641(b) requires a complaint to be served by personal notice or certified mail. Subsection (c) currently requires, and will continue to require, a violation report and/or complaint to be mailed by certified mail to all respondents. However, for many years and continuing today, current, modern practice is that virtually all Commission permittees and respondents in enforcement proceedings conduct business by email. Given the ubiquitous use of email, a respondent or a respondent's representative will typically ask Commission staff to send a violation report and/or complaint by email, rather than having to wait several days to receive a hard copy of a violation report and/or complaint by certified mail. The amendment to subsection (c) is necessary to allow a respondent to waive the right to have a violation report and/or complaint mailed by certified mail and, instead, upon their written consent, to receive a violation report and/or complaint by email.

The amendment to the Authority and Reference note adding a Reference citation to Public Resources Code section 29601, which is the provision of the SMPA authorizing the Commission to issue cease and desist orders, is necessary to make the MPA and SMPA Reference citations consistent in this note because Government Code section 66638 (currently cited) authorizes the Commission to issue cease and desist orders under the MPA.

Section 11322 -- Respondent's Required Response to the Violation Report

Government Code Section 11546.7(a) requires documents posted on a state agency's website to comply with the Web Content Accessibility Guidelines 2.0, or a subsequent version, published by the Web Accessibility Initiative of the World Wide Web Consortium at a minimum Level AA success criteria. The amendment to subsection (a) is necessary to require a respondent to provide electronic copies of the completed statement of defense form and all supporting documents in a format that allows for posting on the Commission's website in compliance with Government Code Section 11546.7(a) so that the completed statement of defense form and all supporting documents are accessible to members of the public on the Commission's website.

The amendment to subsection (b) is necessary to clarify that a respondent may request cross-examination only of a person whose declaration under penalty of perjury is submitted with the violation report and/or complaint (rather than potentially requesting to cross-examination anyone identified in a violation report and/or complaint, as is arguably permissible under the existing regulation text).

The amendment to subsection (d) is necessary to clarify that staff may request cross-examination only of a person whose declaration under penalty of perjury has been submitted with a respondent's completed statement of defense form (rather than providing no limitation on the identify of persons staff may request to cross-examine, as is arguably permissible under the existing regulation text).

The amendment to subsection (f) is necessary to distinguish between the Executive Director considering a request to extend the 35-day time limit imposed by subsection (a) depending on whether the Executive Director has issued: (1) a violation report only; or (2) a violation report and complaint or only a complaint. It is necessary to distinguish between these situations because the MPA does not establish a deadline for an conducting an enforcement hearing on a violation report, but Government Code Section 66641.6(b) provides that a hearing on a complaint shall be conducted within 60 days after the respondent has been served. After being served with a violation report and/or complaint, respondents almost always request an extension of the 35-day time limit to respond imposed by section (a). Respondents typically request additional time both to prepare their statement of defense and to engage in discussions with Commission staff regarding potential settlement of the enforcement matter. However, because Government Code Section 66641.6(b) requires a hearing on a complaint to be held within 60 days, the Executive may only grant a requested extension of time to respond to a complaint if the respondent waives or consents to an extension of the 60-day time limit for a hearing on the complaint. Therefore, the amendment to subsection (f) is also necessary to provide that the Executive Director may for good cause grant an extension of the 35-day time limit to respond to a violation report and complaint or a complaint only if the respondent waives and consents to extend the 60-day time limit for a hearing on the complaint.

The amendment adding new subsection (i) is necessary to clarify that: (1) at any time after the commencement of Commission enforcement proceedings, the Executive Director and respondent may agree on the terms of a proposed stipulated order or settlement agreement to resolve a violation or violations; (2) if such an agreement is reached the Executive Director shall include the proposed stipulated order or settlement agreement in his or her recommended enforcement decision; and (3) the Commission is required to consider whether to adopt the stipulated order or settlement agreement. Thus, the amendment is necessary to clarify that after the commencement of Commission enforcement proceedings, the Commission is required to either approve or reject any proposed stipulated order or settlement agreement. The amendment adding new subsection (i) is also necessary to state the procedures to be followed if the Commission fails to adopt a proposed stipulated order or settlement agreement, with the next steps dependent on whether the respondent has previously submitted a completed statement of defense form and supporting documents.

The amendment to the Authority and Reference note adding a Reference citation to Public Resources Code Section 29601, which is the provision of the SMPA authorizing the Commission to issue cease and desist orders, is necessary to make the MPA and SMPA Reference citations consistent in this note because Government Code section 66638 (currently cited) authorizes the Commission to issue cease and desist orders under the MPA.

Section 11323 -- Distribution of Notice of Enforcement Hearings

The amendments to this section are necessary to allow for mailing notices of an enforcement hearing by email or regular mail and to also require such notices to be made available on the Commission's website. Government Code Section 66638(c) requires notice of the public hearing on

a proposed cease and desist order to be given to all affected persons and agencies but does not prescribe the manner of such notice. The MPA does not require that notice be provided of a public hearing on a complaint, *see* Government Code Section 66641.6. Respondents and members of the public typically request or consent to receive notice of public hearings by email, and the Commission is required to provide notice of all meetings of the enforcement committee or the Commission pursuant to the Bagley-Keene Open Meeting Act. Moreover, Government Code Section 11125, a provision of the Bagley-Keen Open Meeting Act which is cited in subsection (a), requires notice of a meeting of a state body to be made available on the internet at least 10 days prior to the meeting.

Section 11324 -- Distribution of the Violation Report, Complaint, Statement of Defense Form(s), and Recommended Enforcement Decision

The amendment to this section is necessary to allow for distribution of the identified materials for an enforcement hearing by either email or regular mail, and to also provide for making these materials available on the Commission's website.

Section 11326 -- Contents of an Executive Director's Recommended Enforcement Decision

The amendment to subsection (b)(2) is necessary to clarify that the Executive Director's Recommended Enforcement Decision ("ED RED") shall include, in addition to any rebuttal evidence submitted by the staff to matters raised in the statement of defense (as stated in the existing regulation text), the staff's response to the defenses, mitigating factors, or arguments raised by the respondent. This amendment is necessary because the staff does not know at the time the Executive Director issues the violation report or complaint what defenses, mitigating factors, or other arguments a respondent may assert until the respondent submits its statement of defense, and, therefore, the staff cannot address in the violation report or complaint whatever issues are subsequently raised by the respondent.

The amendment adding new subsection (b)(4) is necessary to provide consistency, clarity, and transparency regarding the Executive Director's determination of the amount of proposed civil penalties. As amended, this subsection requires an ED RED to include, in addition to the total amount of proposed administrative civil penalties (as required by the existing regulations – *see* Appendix H, paragraph 8), a statement of the applicable factors set forth in Government Code Section 66641.9 that the Executive Director considered, consistent with the Administrative Civil Penalty Policy (*see* new Appendix J), in determining the total amount of the proposed civil penalties.

The amendment to subsection (b)(7) is necessary to clarify that, depending on the nature of the violations and the manner of resolution of an enforcement action proposed by the Executive Director, an ED RED shall include the proposed text of any stipulated order that the Executive Director recommends that the Commission issue or any settlement agreement that the Executive Director recommends that the Commission approve.

The amendment to the Authority and Reference note adding Reference citations to Public Resources Code Sections 29610 and 29611, which are the penalty provisions of the SMPA, is necessary because an Executive Director's recommended enforcement decision proposing an administrative civil penalty for a violation of a Commission permit issued under the SMPA would implement, interpret, or make specific these statutory provisions in the site-specific factual context of a particular violation. The amendment adding Reference citations to Public Resources Code Sections 29610 and 29611 is also necessary to make the Reference citations for this section consistent with the existing Reference citations in other sections of the regulations concerning a complaint for or order imposing administrative civil liability (*see* notes for sections 11302, 11321 and 11322).

Section 11327 -- Enforcement Hearing Procedure

The amendment to subsection (f) is necessary to clarify the procedures to be followed at enforcement hearing when oral testimony is allowed. The amendment clarifies that if oral testimony is allowed, staff and all respondents shall be allowed to examine or cross-examine all testifying witnesses. The amendment is also necessary to delete the existing text referring to the right to have rebuttal witnesses testify, since this would improperly allow a party to call a surprise witness not previously identified and who did not submit a declaration under penalty of perjury.

The amendment to subsection (g) is necessary to clarify the procedures to be followed at an enforcement hearing when cross-examination is allowed of a witness whose declaration under penalty of perjury has become part of the enforcement record. The amendment clarifies that after any such cross-examination, a representative of the opposing party shall be entitled to examine the witness on the area or areas of information addressed during cross-examination. The amendment to subsection (g) is also necessary to: (1) limit the right of cross-examination and examination to witnesses who have submitted a declaration under penalty of perjury; and (2) protect the First Amendment rights of members of the public to submit information and comments to the Commission or staff regarding alleged violations without fear of being subject to cross-examination or examination at an enforcement hearing. The amendment provides that neither cross-examination nor direct examination shall be allowed of any person who has not submitted a declaration under penalty of perjury which has become part of the enforcement record, including any member of the public who has commented on an enforcement matter or submitted information related to an alleged violation.

The amendment adding new subsection (j) is necessary to clarify the procedures to be followed at enforcement hearing regarding rulings on evidentiary objections. The amendment meets this objective by stating that the enforcement committee or Commission shall rule on any objections to the admissibility of evidence or the acceptance of late evidence and shall identify any evidence submitted but rejected because it was not filed in a timely manner.

The amendment to subsection (l) is necessary to clarify that if a hearing officer has been appointed for an enforcement matter, the hearing officer shall render a written decision that follows the format of an enforcement committee recommended enforcement decision, as set forth in

subsection 11330(a), rather than an Executive Director's recommended enforcement decision, as set forth in subsection 11326(b). The amendment is necessary because, after conducting an enforcement hearing, a hearing officer, like the enforcement committee, would have resolved, or would recommend resolution of, disputed issues and would have issued certain rulings. Therefore, it would be necessary and appropriate for a hearing officer to follow the format of an enforcement committee recommended enforcement decision, rather than the format of an Executive Director's recommended enforcement decision, which is issued prior to a hearing.

Section 11329 -- Admissibility of Evidence

The amendment to subsection (b) is necessary to clarify that hearsay evidence may include information provided by the public to the Commission or staff or in public comments. The amendment to subsection (b) is also necessary to clarify that hearsay evidence shall be sufficient to support a finding only when such evidence: (1) would be admissible over objection in a civil action; or (2) is in the form of a declaration under penalty of perjury and the declarant is subject to cross-examination. The amendment limits reliance on hearsay evidence to support a finding to these two circumstances by deleting the existing text that vaguely references hearsay evidence in the form of document referred to in a violation report or complaint where the author of the document is subject to cross-examination. Staff or a respondent may identify a statement in a document as hearsay but would not be allowed to cross-examination the author of the document under subsections 11327(f) or 11327(g). Therefore, hearsay evidence in such a document would not be sufficient to support a finding.

Section 11330 -- Adoption of an Enforcement Committee Recommended Enforcement Decision

The amendment to this section, as set forth in amended subsection (a), is necessary to clarify the required contents of the Enforcement Committee's Recommended Enforcement Decision ("EC RED"). Existing subsection (a) refers to all matters required by Section 11326 for an ED RED; however, not all matters required by Section 11326 to be included in an ED RED are appropriate for inclusion in an EC RED. In particular, subsection 11326(b)(2) requires an ED RED to include a summary and analysis of all unresolved issues, but after conducting a hearing, the enforcement committee will resolve, or recommends resolution of, all disputed issues, and therefore, an EC RED would not include a summary of unresolved issues.

The amendments to subsections (a)(1) through (a)(7), as revised, are necessary to identify the required contents of an EC RED, both incorporating the relevant provisions of subsection 11326(b) and adding an additional provision, as subsection (a)(2), that an EC RED will include a statement of any rulings by the enforcement committee. The amendment adding new subsection (a)(3) is necessary to provide consistency, clarity, and transparency regarding the enforcement committee's determination of the amount of proposed civil penalties. As amended, this subsection requires an EC RED to include, in addition to the total amount of proposed administrative civil penalties, a statement of the applicable factors set forth in Government Code Section 66641.9 that the

enforcement committee considered, consistent with the Administrative Civil Penalty Policy (*see* new Appendix J), in determining the total amount of the proposed civil penalties.

The amendment to subsection (b) is necessary to establish a clear process for preparation of the EC RED. Specifically, the amendment is necessary to provide that the enforcement committee chair shall direct Commission counsel to prepare the EC RED provided that: (1) Commission counsel submits the EC RED to all respondents for review prior to mailing the EC RED to the Commission; and (2) if a respondent provides written comments or objections, the Executive Director may, if appropriate, revise the recommended decision based on such comments or objections and shall include the respondent's comments or objections when mailing the EC RED to the Commission.

The amendment to the Authority and Reference note adding Reference citations to Public Resources Code Sections 29610 and 29611, which are the penalty provisions of the SMPA, is necessary because an enforcement committee's recommended enforcement decision proposing an administrative civil penalty for a violation of a Commission permit issued under the SMPA would implement, interpret, or make specific these statutory provisions in the site-specific factual context of a particular violation. The amendment adding Reference citations to Public Resources Code Sections 29610 and 29611 is also necessary to make the Reference citations for this section consistent with the existing Reference citations in other sections of the regulations concerning a complaint for or order imposing administrative civil liability (*see* notes for sections 11302, 11321 and 11322).

Section 11331 -- Referral of the Recommended Enforcement Decision to the Commission

The amendment to this section is necessary to allow for mailing a recommended enforcement decision by email or regular mail, and to also provide for making the recommended decision available on the Commission's website.

Section 11332 -- Commission Action on Recommended Enforcement Decision

The amendment to subsection (a) is necessary to reference the additional option for Commission action on a recommended enforcement decision established by the new subsection (c), discussed below.

The amendment adding new subsection (c) is necessary to establish an additional option for Commission action on a recommended enforcement decision when both the respondent and Executive Director agree to accept the recommended decision. This additional option will allow for an abbreviated procedure before the Commission under which the staff and respondent would not need to present their respective arguments or comments on the recommended decision. Instead, after allowing public comment on the matter, the Commission would determine by a majority vote whether to adopt the recommended enforcement decision on consent without any change and without any further proceedings. If it did not vote to adopt the recommended decision on consent, the Commission would proceed to act on the matter in accordance with subsections (a) and (b).

The amendment to the Authority and Reference note adding Reference citations to Public Resources Code Sections 29610 and 29611, which are the penalty provisions of the SMPA, is necessary because the Commission's action on a recommended enforcement decision proposing an administrative civil penalty for a violation of a Commission permit issued under the SMPA would implement, interpret, or make specific these statutory provisions in the site-specific factual context of a particular violation. The amendment adding Reference citations to Public Resources Code Sections 29610 and 29611 is also necessary to make the Reference citations for this section consistent with the existing Reference citations in other sections of the regulations concerning a complaint for or order imposing administrative civil liability (*see* notes for sections 11302, 11321 and 11322).

Section 11333 -- Commission Hearing Procedures on Direct Referral of an Enforcement Matter by the Executive Director

The amendment to this section is necessary to provide clarity that the Executive Director shall determine whether to refer an enforcement matter to the Commission or to the enforcement committee. The Executive Director's authority in this regard is implicit in the existing text of this section and expressly stated by the amendment.

Section 11343 -- Appeal from the Modification of a Commission Cease and Desist Order

The amendment to subsection(a) is necessary to clarify how a person served with a Commission cease and desist order may appeal to the Commission any modification of the order by the Executive Director. The amendment provides that such a person must file a written statement that the party is appealing the modification and the reasons for the appeal.

Section 11351 -- Modification of Permit Revocation Orders

The amendment to the Authority and Reference note adding Reference citations to Government Code Section 66638 and Public Resources Code Section 29601 is necessary because: (1) Government Code Section 66638 authorizes the Commission to issue a cease and desist order under the MPA and provides authority for issuance or modification of a permit revocation order to require any person who has violated a term or condition of a permit to cease such violations; and (2) Public Resources Code Section 29601 authorizes the Commission to issue a cease and desist order under the SMPA and provides authority for issuance or modification of a permit revocation order to require any person who has violated a term or condition of a permit to cease such violations.

Section 11362 -- Service of Copies

The amendments to subsections (a) and (b) are necessary to make the regulatory requirements for service of a cease and desist order issued by the Executive Director and for service of any enforcement order issued by the Commission consistent with applicable statutory requirements.

The amendment to subsection (a) is necessary to reflect that Government Code Sections 66637 and 66638 require a cease and desist order to be served on, in addition to each party to whom the order is issued, the owner of the property on which any violation addressed in the order occurred. The amendment to subsection (a) is also necessary to provide that upon written consent of the person to be served, an order shall be served by email. Subsection (a) currently requires, and as amended will continue to require, a cease and desist order to be served personally or by certified mail, in accordance with Government Code Sections 66637 and 66638, and this subsection also requires, and as amended will continue to require, an order setting administrative civil liability to be served personally or mailed by registered mail, in accordance with Government Code Section 66641.6(d). However, for many years and continuing today, current, modern practice is that virtually all Commission permittees (who typically are the owners of property subject to a Commission permit) and all respondents in enforcement proceedings conduct business by email. Given the ubiquitous use of email, a respondent or a respondent's representative will typically ask Commission counsel to serve any order issued by the Executive Director or the Commission by email, rather than having to wait several days to receive a hard copy of a such an order by certified or registered mail. The amendment to subsection (a) is necessary to allow a respondent to waive the right to have an order mailed by certified or registered mail and, instead, upon their written consent, require service of an order by email.

The amendment to subsection (b) is necessary to reflect that Government Code section 66641.6(d) requires an order setting administrative civil liability to be served on any person who appeared at the hearing and requested a copy, as well as the party to whom the order is issued. The amendment to subsection (b) is also necessary to require service of an order by email, upon written consent of an interested person to be served with a copy of an order. Subsection (b) currently requires, and as amended will continue to require, a cease and desist order to be served personally or by certified mail, in accordance with Government Code Sections 66637 and 66638, on any person who appeared at the hearing and submitted a written request for a copy. This subsection also requires, and as amended will continue to require, an order setting administrative civil liability to be served personally or by registered mail, in accordance with Government Code Section 66641.6(d), on any person who appeared at the hearing and requested a copy. However, for many years and continuing today, current, modern practice is that many members of the public submit comments to the Commission and communicate by email with Commission staff. Given the ubiquitous use of email, interested members of the public will typically ask Commission counsel or staff to serve a copy of any order issued by the Executive Director or the Commission by email, rather than having to wait several days to receive a hard copy of a such an order by certified or registered mail. The amendment to subsection (b) is necessary to allow interested members of the public to waive the right to have an order mailed by certified or registered mail and, instead, upon their written consent, require service of an order by email.

Section 11370 -- Enforcement Record

The amendment to subsection (f) is necessary to clarify that while enforcement hearings and deliberations may be documented by either minutes or a verbatim transcript, a verbatim transcript

shall be prepared of any oral testimony or any cross-examination and direct examination of a person whose declaration under penalty of perjury as become part of the enforcement record.

The amendment deleting existing subsection (j) is necessary because the regulations require staff and respondent(s) to identify and submit copies of the documents or other evidence upon which they rely. Besides being unnecessary, this subsection is unclear because it refers generally to "all other materials maintained in the Commission's files for the enforcement matter," and, therefore, is too vague to provide the specificity needed to identify and include a document or other "materials" in the record.

Section 11380 -- Content of Complaint for Administrative Civil Liability

The amendment adding new subsections (a), (b), and (c) is necessary to provide consistency, clarity, and transparency regarding the Executive Director's determination of the amount of proposed civil penalties. As amended, this section requires a complaint to include, in addition to the total amount of proposed administrative civil penalties (as required by the existing regulations – *see* Appendix H, paragraph 8): a list or table of all alleged violations for which staff is proposing a penalty; and a statement of the applicable factors set forth in Government Code Section 66641.9 that the Executive Director considered, consistent with the Administrative Civil Penalty Policy (see new Appendix J), in determining the total amount of the proposed civil penalties.

The amendment to the Authority and Reference note adding an authority citation to Public Resources Code Section 29201(e) is necessary because that provision authorizes the Commission to adopt regulations consistent with the SMPA. The amendment adding an authority citation to Public Resources Code Section 29201(e) is also necessary to make the authority note for this section consistent with existing the authority notes in other sections of the regulations concerning a complaint for or order imposing administrative civil liability (*see* sections 11302, 11321, 11322, 11326, 11330 and 11332).

The amendment to the Authority and Reference note adding Reference citations to Public Resources Code Sections 29610 and 29611, which are the penalty provisions of the SMPA, is necessary because a complaint for a violation of a Commission permit issued under the SMPA would implement, interpret, or make specific these statutory provisions in the site-specific factual context of a particular violation. The amendment adding Reference citations to Public Resources Code Sections 29610 and 29611 is also necessary to make the Reference citations for this section consistent with the existing Reference citations in other sections of the regulations concerning a complaint for or order imposing administrative civil liability (*see* note sections 11302, 11321 and 11322).

Section 11381 -- Commission Hearing on Complaint for Administrative Civil Liability

The amendment to subsection (a) is necessary to provide that the Executive Director may for good cause grant an extension of the 60-day time limit for a hearing on the complaint established by Government Code Section 66641.6(b). After being served with a violation report and/or complaint, respondents almost always request an extension of the 35-day time limit to respond imposed by

Section 11322(a). Respondents typically request additional time both to prepare their statement of defense and to engage in discussions with Commission staff regarding potential settlement the enforcement matter. However, because Government Code Section 66641.6(b) requires a hearing on a complaint to be held within 60 days, the Executive may grant a requested extension of time to respond to a complaint only if the respondent consents to an extension of the 60-day time limit for a hearing on the complaint.

The amendment adding new subsection (c)(2) is necessary to state additional relevant factors to be considered by the Executive Director in determining whether to refer a complaint to the Commission or to the enforcement committee. Those additional factors are: (1) whether Executive Director has issued a cease and desist order for the violations alleged in the complaint; and (2) whether the Executive has proposed that any order setting administrative civil liability be combined with a Commission cease and desist order and/or a permit revocation order.

Section 11383 -- Contents of a Commission Order Setting Administrative Civil Liability

The amendment to subsections (a)(2) is necessary to provide consistency, clarity, and transparency regarding the amount of civil penalties assessed by Commission in an order setting administrative civil liability. As amended, this subsection requires such an order to include, in addition to the amount of civil penalties, findings addressing the applicable factors set forth in Government Code Section 66641.9 that the Commission considered in determining the amount of the civil penalties.

The amendment to subsection (a)(3) is necessary to reflect that, where requiring the full amount of penalties to be paid in a single payment would result in financial hardship to a respondent, the Commission may order that the penalties shall be paid in installments. As amended, this subsection requires an order to specify the date by which the civil penalties must be paid in full, or, if the penalties are to be paid in installments, the amount of each installment and the date by which each installment must be paid.

The amendment to the Authority and Reference note adding an Authority citation to Public Resources Code Section 29201(e) is necessary because that provision authorizes the Commission to adopt regulations consistent with the SMPA. The amendment adding an Authority citation to Public Resources Code Section 29201(e) is also necessary to make the Authority citation for this section consistent with existing the Authority citations in other sections of the regulations concerning a complaint for or order imposing administrative civil liability (*see* notes for sections 11302, 11321, 11322, 11326, 11330 and 11332).

The amendment to the Authority and Reference note adding Reference citations to Public Resources Code Sections 29610 and 29611, which are the penalty provisions of the SMPA, is necessary because an order setting administrative civil liability for a violation of a Commission permit issued under the SMPA would implement, interpret, or make specific these statutory provisions in the site-specific factual context of a particular violation. The amendment adding Reference citations to Public Resources Code Sections 29610 and 29611 is also necessary to make the Reference citations for this section consistent with the existing Reference citations in other

sections of the regulations concerning a complaint for or order imposing administrative civil liability (*see* notes for sections 11302, 11321 and 11322).

New Chapter 13, Subchapter 2, Article 3 -- Standardized Fines, Amending Section 11386 and Adding New Sections

The amendments to Section 11386 that break up the existing section into six sections under a new Article 3 to Chapter 13, subchapter 2 of the regulations, which includes amended Section 11386 and new Sections 11387 through 11391, are necessary to improve the clarity of the regulations governing standardized fines. The existing text of Section 11386 has 11 subsections, with most of those subsections containing numerous subsections. As a result, existing Section 11386 is difficult to follow, and certain provisions may be unclear. These concerns about the clarity of the standardized fines regulations would be compounded by the additional detail and new provisions that are added by the amendments. For these reasons, it is necessary to add a new Article 3 to Chapter 13, Subchapter 2 of the regulations, entitled Standardized Fines.

Section 11386 -- Applicability of Article

As amended, Section 11386 contains the provisions of existing subsection 11386(a), which identifies the categories of violations that, based on specified determinations by the Executive Director, are subject to resolution through the standardized fines process.

The amendment adding new subsection (b) is necessary to cross-reference, for purposes of this Article, the definition of term “significant harm to the Bay’s resources or to existing or future public access” set forth in Section 11310(g).

The amendment adding new subsection (c) is necessary to clarify that in cases involving both a violation that has not resulted in significant harm to the Bay's resources or to public access and a violation that has resulted in such harm, the Executive Director may, depending on the nature and extent of all the violations and on whether the responsible party has taken appropriate action to resolve the violations, commence Commission enforcement proceedings for all the alleged violations (*i.e.,* issue a violation report and/or complaint leading to an enforcement hearing and adoption of an order by the Commission). This amendment is necessary to enable the Executive Director, in appropriate cases, to bring all alleged violations to the attention of the Commission for resolution in single enforcement proceeding rather than having to attempt to resolve certain violations through the standardized fines process while other, related violations are resolved through a Commission enforcement proceeding. In addition to being necessary to allow for comprehensive resolution of all violations by the Commission in one proceeding, this amendment is necessary to allow the Executive Director to efficiently use limited staff resources in resolving enforcement matters.

The Authority and Reference note for this section, and the corresponding Authority and Reference notes for new Sections 11387 through 11391, are the same as the Authority and Reference note for

existing section 11386 with the following three amendments. First, the amendment deleting the Reference citation to Government Code Section 66632(f), which authorizes the Commission to adopt regulations to enable it to carry out its functions under the MPA, is necessary because Section 66632(f) is incorrectly referenced; this statutory provision is properly included as an Authority citation. Second, the amendment deleting the Reference citation to Public Resources Code Section 29201(e), which authorizes the Commission to adopt regulations consistent with the SMPA, is necessary because Section 29201(e) is incorrectly referenced; this statutory provision is properly included as an Authority citation. Third, the amendment changing the Reference citation to Government Code Section 66641.5 to specifically reference Section 66641.5(e) is necessary because subsection 66641.5(e) authorizes the Commission to impose administrative civil liability.

Section 11387 -- Notice of Alleged Violation

New Section 11387 contains the provisions of existing subsection 11386(b), which specifies the information to be included in the written notice to the person responsible for a violation subject to resolution through the standardized fines process.

The amendments to subsections (b) and (c) (existing subsections 11386(b)(2) and (3)), changing the existing references to a "civil penalty to a "fine" are necessary for consistency and clarity. Even though standardized fines are a form of administrative civil penalty, Article 3 is entitled "Standardized Fines" and it is clearer to use the words "fine" or "fines," rather than "civil penalty" throughout the Article. In addition, the amendment to subsection (c) deleting the words "the penalty portion of" a violation and adding the words "taking each and every corrective action required by the notice and" is necessary to clarify that the responsible party will resolve the violation in full by both taking the required corrective actions and paying the applicable standardized fine.

Section 11388 -- Opportunity to Complete Corrective Action without Imposition of a Standardized Fine

New Section 11388 contains the provisions of existing subsection 11386(c), which provides that the Commission shall not impose any standardized fine if the party responsible for the violation submits information demonstrating that such person has completed each and every corrective action specified in the notice of violation within 35 days. The amendment to this subsection is necessary to clarify that, as an alternative to demonstrating that specified corrective action has been timely completed, a responsible party may submit information demonstrating that the alleged violation has not occurred.

Section 11389 -- Opportunity to Complete Corrective Action with Imposition of a Standardized Fine

New section 11389 contains the provisions of existing subsection 11386(d), which provides that if a responsible party fails to submit information demonstrating that such person has completed each

and every corrective action specified in the notice of violation within 35 days, such party may resolve the violation by completing each and every required corrective action as soon thereafter as possible and by paying a fine in the amount provided in Sections 11390(a) or 11390(b). The amendments to this section are necessary to change the references to subsections (b), (e), (f), and (g) of existing Section 11386 to correspond to new subsections 11387, 11390(a), 11390(b), and 11390(d), respectively.

Section 11390 -- Violations Subject to a Standardized Fine and Schedule of Standardized Fines

New section 11390 contains the provisions of existing subsections 11386(e), (f), (g), and (h), in new corresponding subsections (a) through (d), respectively.

New subsection 11390(a) contains the provisions of existing subsection 11386(e), which establishes the schedule of standardized fines that apply to six categories of violations described in the regulation. The amendment to subsection (a)(1) is necessary to clarify that the standardized fines established by this subsection apply, in addition to the failure to return an executed permit before commencing work (as generally required by Commission permits), to the similar violation of failing to return an executed permit issued to authorize previously commenced or completed work (*i.e.,* an after-the-fact permit) within the time periods stated in the permit.

The amendments to subsections (a)(1)(A) and (B), and to many but not all the standardized fines established by subsection (a)(2) through (a)(6), as discussed below, are necessary to raise the amounts of many but not all standardized fines to create a greater incentive for responsible parties to take necessary corrective action promptly to resolve violations. Increasing the standardized fine amounts for certain violations is also necessary to promote consistency among the fine amounts for relatively similar violations and is appropriate because the standardized fines regulation was last reviewed and amended in 2003 (when most fine amount were not changed but some were raised and others reduced).

More specifically, the amendment to subsection (a)(1)(A) is necessary to increase from $1,000 to $2,000 the standardized fine that applies if an executed permit is returned between 36 and 65 days after the date of the notice of violation. The amendment to subsection (a)(1)(B) is necessary to increase the standardized fine that applies if an executed permit is returned more than 65 days after the date of the notice from $3,000 plus $100 per day from 65th day to the date the executed permit is received to $5,000 plus $500 per day from 65th day to the date the executed permit is received.

Subsection (a)(2) establishes the standardized fines that apply to the failure to submit any document other than an executed permit in the form, manner, or time required by a Commission permit. The amendment to subsection (a)(2)(A) is necessary to increase from $1,000 to $2,000 the

standardized fine that applies if a required document is submitted between 36 and 65 days after the date of the notice of violation. The amendment to subsection (a)(2)(B) is necessary to increase from $3,000 to $5,000 the standardized fine that applies if a required document is submitted between 66 and 95 days after the date of the notice. The amendment to subsection (a)(2)(C) is necessary to increase the standardized fine that applies if a required document is submitted more than 95 days after the notice from $3,000 plus $100 per day from 96th day to the date the document is submitted to $5,000 plus $500 per day from 96th day to the date the document is submitted.

Subsection (a)(3) establishes the standardized fines that apply to the failure to comply with any condition required by a Commission permit not covered by subsections (a)(1) or (a)(2). The amendment to subsection (a)(3)(A) is necessary to increase from $1,000 to $2,000 the standardized fine that applies if the failure to comply is corrected between 36 and 65 days after the date of the notice of violation. The amendment to subsection (a)(3)(B) is necessary to increase from $3,000 to $5,000 the standardized fine that applies if the failure to comply is corrected between 66 and 95 days after the date of the notice. The amendment to subsection (a)(3)(C) is necessary to increase the standardized fine that applies if the failure to comply is corrected more than 95 days after the notice from $3,000 plus $100 per day from 96th day to the date the failure to comply is corrected to $5,000 plus $500 per day from 96th day to the date the failure to comply is corrected.

Subsection (a)(4) establishes the standardized fines that apply to the failure to obtain a Commission permit prior to undertaking any activity that can be authorized by an administrative permit. The amendment to subsection (a)(4) is necessary to clarify that the standardized fines established by this subsection also apply to the similar violation of failing to obtain an amendment to a previously issued permit prior to undertaking any activity that can be authorized by a permit amendment.

In addition, the amendments to subsections (a)(4)(A), (B), and (C) are necessary to clarify what a person who has undertaken activity without obtaining a permit or permit amendment needs to submit to the Commission to stop additional fines from accruing for the unauthorized activity. In each of these subsections, the vague reference to "a filable application" is replaced by the words "a complete and properly executed application accompanied by a check or money order for the applicable application fee, as determined pursuant to Appendix M, Section (b) of the Commission's regulations."

No change is proposed to the standardized fines established by subsections (a)(4)(A) or (a)(4)(B). The amendment to subsection (a)(4)(C) is necessary to increase the standardized fine that applies if either an application is submitted or the unauthorized activity is completely corrected more than 95 days after the notice from $5,000 plus $100 per day to $5,000 plus $500 per day from the 96th day to the date a complete and properly executed application is submitted or the activity is completely corrected.

Subsection (a)(5) establishes the standardized fines that apply to the failure to obtain a Commission permit prior to undertaking any activity that can be authorized by a regionwide permit. The amendment to subsection (a)(5) is necessary to clarify that the standardized fines established by this subsection also apply to the similar violation of failing to obtain a Commission permit for any activity that can be authorized by an abbreviated regionwide permit.

In addition, the amendments to subsections (a)(5)(A), (B), and (C) are necessary to clarify what a person who has undertaken activity that can be authorized by a regionwide permit or an abbreviated regionwide permit without obtaining the necessary authorization needs to submit to the Commission to stop additional fines from accruing for the unauthorized activity. In each of these subsections, the vague reference to "a filable application" is replaced by the words "a complete notice of intent to proceed under a regionwide permit or abbreviated regionwide permit."

In addition, the amendment to subsection (a)(5)(A) is necessary to increase from $1,000 to $2,000 the standardized fine that applies if either a notice of intent to proceed is submitted between 36 and 65 days and the Executive Director approves the notice of intent within 155 days of the notice of violation or the unauthorized activity is completely corrected between 36 and 65 days of the notice of violation. The amendment to subsection (a)(5)(B) is necessary to increase from $2,000 to $4,000 the standardized fine that applies if either a notice of intent to proceed is submitted between 66 and 95 days and the Executive Director approves the notice of intent within 185 days of the date of the notice of violation or the unauthorized activity is completely corrected between 66 and 95 days of the notice of violation. The amendment to subsection (a)(4)(C) is necessary to increase the standardized fine that applies if either a notice of intent to proceed is submitted or the unauthorized activity is completely corrected more than 95 days after the notice of violation from $2,000 plus $100 per day to $5,000 plus $500 per day from the 96th day to the date a complete notice of intent to proceed is submitted or the unauthorized activity is completely corrected.

Subsection (a)(6) establishes the standardized fines that apply to the placement of fill, extraction of materials, or a change of use that could not be authorized under the Commission's law and policies. The amendment to subsection (a), which deletes the clause, "but is an activity similar in size and scope to the activities listed in Sections 10601(a) through 10601(e)," is necessary for clarity. The intent and meaning of the clause "an activity similar in size and scope to the activities listed in sections 10601(a) through (e)" is ambiguous and the determination of what constitutes "an activity similar in size and scope" to those listed in the cited regulation has been problematic in practice. Therefore, for clarity and consistency it is necessary to amend this subsection to refer simply to an activity that could not be authorized under the Commission's laws and policies. As amended, this section applies to unauthorized activities that meet the requirements in section 11386(a) for addressing a violation using standardized fines and that must be corrected by removing the fill and/or taking other steps to correct the violation.

No change is proposed to the standardized fines established by subsections (a)(6)(A) or (a)(6)(B) if a violation is corrected and the area restored between 36 and 65 days or between 66 and 95 days,

respectively, from the date of the notice of violation. The amendment to subsection (a)(6)(C) is necessary to increase the standardized fine that applies if a violation is not corrected and the area restored more than 95 days after the notice of violation from $8,000 plus $100 per day to $8,000 plus $500 per day from the 96th day to the date the violation is corrected is completely corrected.

New subsection 11390(b) contains the provisions of existing subsection 11386(f), which provides that a person responsible for a violation must pay double the amount listed in subsection (a) if that person has previously paid any standardized fine within the five years prior to resolution of the alleged violation. The amendment to this subsection is necessary to clarify that the provision of this subsection requiring the payment of doubled fines applies where a violator has been assessed but has failed to pay any standardized fine as well as where a violator has previously paid a standardized fine.

New subsubsection 11390(c) contains the provisions of existing subsection 11386(g), which provides that if a violation resolved without the imposition of a standardized fine is repeated by the same person within five years, certain provisions of the standardized fines regulations shall not apply; instead, the person responsible for the subsequent violation shall pay the standardized fine specified in this subsection for each day the subsequent violation occurs or persists after the date of the notice of violation. The amendment to this subsection is necessary to: (1) increase the standardized fine applicable under this subsection from $100 to $200 per day; and (2) clarify that such fine shall accrue for each day the violation continues to occur or persist after the notice of violation until the violation is resolved.

New subsection 11390(d) contains the provisions of existing subsection 11386(h), which provides that if the person responsible for the violation does not complete all the required corrective actions within 125 days of the notice of violation or does not pay the amount of standardized fines assessed when payment is due, the Executive Director may commence Commission enforcement proceedings to resolve the violation. The amendment to this subsection is necessary to clarify that if the Executive Director terminates the opportunity for resolution of a violation using the standardized fine process, after determining that the person responsible for the violation has not made a good-faith effort to correct the violation, the Executive Director shall commence Commission enforcement proceedings promptly after mailing a notice to the violator stating that the standardized fine process will no longer be available.

Section 11391 -- Notice of Liability for Standardized Fines and Opportunity to Appeal or to Resolve Violation through Commission Enforcement Proceedings

New section 11391 contains the provisions of existing subsections 11386(e), (f), (g), and (h), in new corresponding subsections (a) through (d), respectively.

As amended, subsection 11391(a) contains the provisions of existing subsection 11386(i), which provides that after a violation has been completely resolved, a person subject to standardized fines can appeal the amount of the fines to the Executive Director and Chair, who can reduce the amount of the fines to an amount they believe is appropriate. The amendment to this subsection is

necessary to provide clarity as to: (1) the amount of standardized fines accrued; (2) giving notice to the responsible party of the amount of such fines; and (3) establishing a deadline for appealing the amount of fines. The amendment requires the staff, after a violation has been resolved, to notify the person responsible for the violation of the amount of standardized fines assessed and requires that the notice advise the person of his or her right to appeal the amount of the fines by submitting within 21 days a written statement that the person is appealing and the reasons for the appeal. The amendment is also necessary to: (1) require staff to submit a response to the appeal within 14 days; and (2) provide that the Executive Director and Chair can establish a schedule for the payment of the standardized fines in installments, as well as reduce the amount of the standardized fines to an amount that they believe is appropriate.

As amended, subsection 11391(b), contains the provisions of existing subsection 11386(j), which provides that any person who believes that the time limit for resolution of a violation is inappropriate may appeal that time limit to the Executive Director and Chair who can modify the time limit as they believe is appropriate. The amendment to this subsection is necessary to provide clarity as to the time limit for resolution of a violation without accrual of a standardized fine, the standard for an appeal of that time limit, and the process for such an appeal. The amendment clarifies that: (1) any appeal would be of the 35-day time limit for resolution of a violation without standardized fines pursuant to sections 11387 and 11388, rather than of any time limit established pursuant to former subsection (h) (new subsection 11390(d)), which does not provide for the establishment of time limits; and (2) any appeal must be on the grounds that meeting the 35-day limit is "not feasible," rather than, vaguely, "inappropriate." The amendment is also necessary to require the person appealing to submit within 35-days of the notice of violation a written statement that the person is appealing, the reasons for the appeal, and a proposed alternative date to complete the required corrective action. The amendment is also necessary to provide that the Executive Director and the Chair can modify both the 35-day time limit and the time periods for accrual of standardized fines set forth in Section 11390(a) for the violation as they believe appropriate.

The amendment adding new subsection 11391(c) is necessary to establish a deadline for the payment of standardized fines if a person subject to such fines does not appeal the amount of such fines. Because the existing regulations do not include a deadline for payment of fines, the timing of a responsible party's payment obligation, and the Executive Director's remedies in the event of nonpayment of standardized fines, currently are unclear. The amendment is necessary to provide that if any person subject to standardized fines does not appeal the amount of such fines within 21 days of receiving notice from staff under subsection (a) of the amount of standardized fines assessed, the full amount of such fines shall be due and payable by cashier's check 30 days after the date of the notice.

The amendment adding new subsection 11391(d) is necessary to establish a deadline for the payment of standardized fines if a person subject to such fines timely appeals the amount of such fines. The amendment is necessary to provide that if any person subject to standardized fines appeals the amount of such fines within 21 days of receiving notice from staff under subsection (a) of the amount of standardized fines assessed, any fines that the Executive Director and Chair

determine to be appropriate shall be due and payable by cashier's check by the date or dates specified in their decision on the appeal.

As amended, subsection 11391(e) contains the provisions of existing subsection 11386(k), which states any person responsible for a violation is entitled to have the violation resolved through Commission enforcement proceedings if that person believes such proceedings are necessary to fairly determine the appropriate remedy or civil penalty amount. The amendment to this subsection is necessary to provide clarity as to a responsible party's right to request that a violation be resolved through Commission enforcement proceedings and to establish deadlines for submitting such a request. Because the existing regulations do not include a procedure or deadline for requesting that a violation be resolved through Commission enforcement proceedings, the manner and permissible time for a responsible party to submit such a request currently are unclear. The amendment is necessary to provide that any person receiving a notice of violation under section 11387 may waive the opportunity to resolve the violation under this Article by submitting a letter to the Executive Director indicating such a waiver and requesting that the violation be resolved through Commission enforcement proceedings. The amendment is also necessary to establish that such a waiver and request that the violation be resolved through Commission enforcement proceedings may be submitted at any time after receipt of a notice of violation but no later than: (1) twenty one days after the date of the notice provided by staff under subsection 11391(a) of amount of standardized fines assessed, if the person receiving such notice elects not to appeal the amount of such fines to the Executive Director and Chair; or (2) fourteen days after the date of the decision of the Executive Director and Chair on any appeal of the amount of standardized fines. The amendment is also necessary to provide that if a waiver and request that the violation be resolved through Commission enforcement proceedings is submitted after staff has provided notice of the amount of fines assessed under subsection 11391(a) or after the decision on any appeal of the amount of standardized fines, no such fines shall be due pursuant to that notice or that decision, and the appropriate amount of fines or administrative civil penalties shall be determined through Commission enforcement proceedings.

The amendment adding new subsection 11391(f) is necessary to clarify the actions to be taken by the Executive Director if a person subject to standardized fines fails to pay such fines when due. Because the existing regulations do not address this issue, the Executive Director's remedies in the event of nonpayment of standardized fines currently are unclear. The amendment is necessary to provide that if a person subject to standardized fines fails to pay such fines when due and payable, and if such person has not waived the opportunity to resolve a violation under this Article and requested that the violation be resolved through Commission enforcement proceedings, the Executive Director shall commence Commission enforcement proceedings to resolve the violation. The amendment is also necessary to provide that in such enforcement proceedings, the person subject to fines may not contest his or her liability for the violation or that the violation occurred, and the Commission shall determine only whether the amount of standardized fines was properly calculated in accordance with Section 11390.

Appendix H -- Violation Report/Complaint Form

As referenced in subsections 11321(a)(1) and 11321(a)(2) and section 11380 of the regulations, Appendix H sets forth the format and content of a violation report and/or complaint. The amendments to Appendix H are necessary to require that the Executive Director include additional information in a violation report/complaint and to improve the clarity of the text.

More specifically, the amendments to Appendix H are necessary to require the Executive Director to include the following information regarding the enforcement process at the top of the first page of a violation report/complaint, including: (1) any file and permit number; (2) the date of mailing of the violation report/complaint; (3) the 35th day after mailing (*i.e.,* the date the respondent's completed statement of defense is due, absent an extension); (4) the 60th day after mailing (*i.e.*, the date a hearing on a complaint is required, absent an extension); (5) any scheduled hearing date; and (5) the name(s) or the respondent(s).

The amendments to Appendix H are also necessary to update the phone number of the Commission's offices in paragraphs 2 and 4.

The amendments to Appendix H are also necessary to provide clarity regarding the specific documents on which the Commission staff relies to make a prima facie case of the alleged violations and to expedite providing copies of all such documents to a respondent. Consistent with the amendments to subsection 11321(b), discussed above, the amendments to Appendix H are necessary to require (by revisions to paragraph 2 and numbered item 6 and by the addition of a new numbered item 10) a violation report/complaint to include a list of all evidence relied on by staff, including any declarations under penalty of perjury, and to further require that all supporting evidence be attached to or accompany the violation report/complaint or be provided to the respondent in electronic format upon request.

The amendments to Appendix H are also necessary to provide consistency, clarity, and transparency regarding the Executive Director's determination of the amount of proposed civil penalties. Consistent with the amendments to Section 11380, discussed above, the amendments to numbered item 6 are necessary to require a complaint to include: (1) a list or table of all alleged violations for which staff is proposing a penalty; (2) the total amount of proposed penalties; and (3) a statement of the applicable factors set forth in Government Code Section 66641.9 that the Executive Director considered, consistent with the Administrative Civil Penalty Policy in Appendix J of the regulations, in determining the total amount of the proposed penalties.

The amendments to Appendix H are also necessary to change the existing references to "illegal activity" in numbered items 1, 2, 3, 4, and 5 to refer instead to "the violation or unauthorized activities," which are descriptive terms and do not draw a legal conclusion of illegality.

Finally, the amendments to Appendix H are necessary to add an Authority and Reference note with appropriate citations. The Authority citation to Government Code Section 66632(f) is necessary because that section authorizes the Commission to adopt regulations to enable it to carry out it

functions under the MPA. The Authority citation to Public Resources Code Section 29201(e) is necessary because that section authorizes the Commission to adopt regulations consistent with the SMPA. The Reference citation to Government Code Section 66638 is necessary because that section authorizes the Commission to issue a cease and desist order under the MPA. The Reference citation to Government Code Section 66641.5(e) is necessary because that section authorizes the Commission to impose administrative civil liability. The Reference citation to Government Code Section 66641.6 is necessary because that section authorizes the Executive Director to issue a complaint for, and the Commission to adopt an order setting, administrative civil liability. The Reference citation to Public Resources Code Section 29601 is necessary because that section authorizes the Commission to issue a cease and desist order under the SMPA. The Reference citations to Public Resources Code Sections 29610 and 29611 are necessary because those sections authorize the imposition of penalties under the SMPA.

Appendix I -- Statement of Defense Form

As referenced in subsection 11321(a)(3) of the regulations, Appendix I sets forth the format of the statement of defense form to be completed by a respondent in an enforcement proceeding. The amendments to Appendix I are necessary to revise the existing text to improve clarity, reduce redundancy, and update the form with the Commission's current office address and phone number.

The amendment to the second paragraph of Appendix I is necessary to delete the first sentence of that paragraph which states that, depending on the outcome of further discussions with staff after the respondent has completed and returned the form, enforcement proceedings may nevertheless be initiated. The deleted statement is misleading and inaccurate because Commission enforcement proceedings will already have been initiated by issuance of the violation report/complaint.

The amendment to the fifth paragraph of Appendix I is necessary to provide clarity and notice to respondents that a respondent's failure to raise a defense or mitigating factor or to submit evidence in response to the violation report/complaint will waive the respondent's right to raise such defense or mitigating factor or to submit such evidence at the enforcement hearing.

Consistent with the amendment to subsection 11322(b), discussed above, the amendments to the fifth and sixth paragraphs of Appendix I are necessary to provide clarity that a respondent may only identify for potential cross-examination any person whose declaration under penalty of perjury was submitted by staff with the violation report/complaint.

Consistent with the proposed amendments to subsection 11322(a), discussed above, the amendment adding a new eighth paragraph to Appendix I is necessary to require a respondent to provide electronic copies of both the completed statement of defense form and all supporting documents in a format that allows for posting on the Commission's website in compliance with Government Code Section 11546.7(a), so that the materials submitted by the respondent are accessible to members of the public on the Commission's website. Government Code Section

11546.7(a) requires documents posted on a state agency's website to comply with the Web Content Accessibility Guidelines 2.0, or a subsequent version, published by the Web Accessibility Initiative of the World Wide Web Consortium at a minimum Level AA success criteria.

Consistent with the proposed amendments to subsection 11322(f), the amendment to paragraph nine of Appendix I is necessary to provide clarity that, for good cause, a respondent may submit a written request for extension of the 35-day time limit to respond to a violation report or complaint, but that if the Executive Director has issued a combined violation report and complaint or only a compliant, the extension request must include a waiver of and consent to extend the 60-day time limit for a hearing on the complaint under Government Code 66641.6(b). This amendment is necessary because although the MPA does not establish a deadline for an conducting an enforcement hearing on a violation report, Government Code Section 66641.6(b) provides that a hearing on a complaint shall be conducted within 60 days after the respondent has been served. After being served with a violation report and/or complaint, respondents almost always request an extension of the 35-day time limit to respond. Respondents typically request additional time both to prepare their statement of defense and to engage in discussions with Commission staff regarding potential settlement of the enforcement matter. However, because Government Code Section 66641.6(b) requires a hearing on a complaint to be held within 60 days, the Executive may only grant a requested extension of time to respond to a complaint if the respondent waives and consents to an extension of the 60-day time limit for a hearing on the complaint.

The amendment adding a new numbered item 5 to Appendix I is necessary to provide clarity and notice to respondents that, if the Executive Director is proposing an administrative civil penalty, a respondent asserting inability to pay or that the proposed penalty would have a substantial adverse effect on the respondent's ability to continue in business, is required to raise this issue in its statement of defense and provide factual information and supporting documentation establishing such inability to pay or such adverse effect. This amendment is also necessary to provide clarity that relevant supporting documentation may include audited financial statements and reports, balance sheets, profit and loss statements, statements of net worth, annual budgets, bond prospectuses, and tax returns including supporting forms and schedules as may be appropriate. This amendment is also necessary to direct respondents, before submitting such information, to redact all personal information including any social security or tax-payer identification number, driver's license/state identification number, financial account number and any other private, non-public personal information.

Finally, the amendments to Appendix I are necessary to add an Authority and Reference note with appropriate citations. The Authority and Reference citations for Appendix I are the same as the Authority and Reference citations for Appendix H and are necessary for the same reasons discussed above under Appendix H.

Appendix J – Administrative Civil Penalty Policy

Government Code Section 66641.5(e) authorizes the Commission to impose on any person or entity an administrative civil penalty for a violation of not less than ten dollars ($10) and not more than two thousand dollars ($2000) for each day in which the violation occurs or persists, up to a maximum of thirty thousand dollars ($30,000) for a single violation. Government Code Section 66641.9(a) specifies the factors to be considered by the Commission in determining the amount of an administrative civil penalty:

> In determining the amount of administrative civil liability, the commission shall take into consideration the nature, circumstance, extent, and gravity of the violation or violations, whether the violation is susceptible to removal or resolution, the cost to the state in pursuing the enforcement action, and with respect to the violator, the ability to pay, the effect on ability to continue in business, any voluntary removal or resolution efforts undertaken, any prior history of violations, the degree of culpability, economic savings, if any, resulting from the violation, and such other matters as justice may require.

Gov't Code § 66641.9(a).

Government Code Section 66641.9(a) grants the Commission broad discretion in determining the amount of an administrative penalty to impose for a violation or violations. Section 66641.9(a) requires the Commission to consider the factors specified in the statute but does require the Commission to apply or weigh any of those factors in a particular manner in determining the appropriate penalty amount for a particular violation. Nevertheless, the Commission has determined that it is necessary to adopt an Administrative Civil Penalty Policy ("Policy") to guide the exercise of discretion by the Executive Director and Commission staff in determining the appropriate amount of proposed administrative penalties, and by the Commission in determining and imposing such penalties, in a consistent, transparent, and fair manner.

The overarching goal of the Policy is to protect and enhance the resources of San Francisco Bay and its shoreline and to protect and maintain public access to the Bay and its shoreline in the most efficient, effective, consistent, transparent, and fair manner. The Policy is intended to enable the Commission and its Executive Director and staff to expend their limited resources in ways that deter violations of the Commission's laws, policies, and permits, and that protect the public and the public's interest in the Bay as a resource of statewide significance. The Policy implements and provides guidance regarding the Commission's exercise of its enforcement powers set forth in the MPA (Government Code Sections 66637-66643) and the SMPA (Public Resources Code Sections 29601, 29610-29611).

More specifically, the purpose of the Policy is to promote the enforcement goals of consistency, transparency, fairness, and the deterrence of noncompliance. The principles of consistency and fairness relate to treating similar violations similarly with respect to the amount of the administrative civil penalty imposed by the Commission. A second aspect of fairness is to ensure that those who are unwilling to incur the expenses of regulatory compliance not be rewarded for

making that choice. It is the intent of the Commission that administrative civil penalties should be used as a tool to maintain a level-playing field for those who comply with their regulatory obligations by imposing administrative civil penalties on those who do not. Appropriate administrative civil penalties for violations offers some assurance of equity between those who chose to comply with applicable requirements and those who violate them.

The principle of transparency relates to assuring that the amount of an administrative penalty is based on a clearly defined methodology and on factual findings that are based on evidence in the record or clearly articulated policy considerations. The principle of deterrence relates to preventing harm to the Bay's resources, protecting and maintaining public access, and encouraging the regulated community to voluntarily identify and correct violations.

The Policy consists of an Introduction and two parts: (1) Part I, Penalty Calculation Methodology; and (2) Part II, Supplemental Environmental Projects.

Part I, Penalty Calculation Methodology, is necessary to establish an administrative civil penalty assessment methodology that provides for consideration of the statutory factors set forth in Government Code Section 66641.9(a) and creates a transparent, fair, and consistent approach to the determination and imposition of appropriate administrative civil penalties for violations. The Penalty Calculation Methodology is necessary to implement and expand upon a State Auditor Audit Report recommendation to create "a penalty calculation worksheet" to be used for all enforcement actions that creates "formal policies, procedures, and criteria to provide staff with guidance on applying the worksheet." In adopting the Penalty Calculation Methodology, the Commission joins other State regulatory agencies that have adopted a penalty calculation methodology for determining appropriate administrative penalties under the statutes administered by those agencies. *See e.g.,* State Water Resources Control Board, Water Quality Enforcement Policy, Section VI., Monetary Assessments in Administrative Civil Liability (ACL) Actions, April 4, 2017 ("SWRCB Penalty Policy"); Department of Toxic Substances Control, regulations governing the assessment of administrative penalties, 22 C.C.R. §§ 66272.60 – 66272.69 ("DTSC Penalty Policy").

Part II, Supplement Environmental Projects, is necessary to recognize the value in using a violator's performance of a supplemental environmental project ("SEP") as an alternative to the violator's payment of a portion of the administrative civil penalties imposed for a violation or violations, while establishing guidelines and requirements for Commission approval of such a project to ensure that the project provides the expected benefits. After the commencement of Commission enforcement proceedings, it is not uncommon for a violator to propose in settlement discussions that it be allowed to undertake an environmentally beneficial project in lieu of paying all or a portion of the administrative civil penalties that would otherwise be imposed by the Commission for a violation or violations. While the completion of such a project can result in environmental benefits to the Bay's resources and/or public access to the Bay and its shoreline, Part II of the Policy is necessary to provide guidelines that identify the types of projects that are acceptable to the Commission as SEPs, consistent with its statutory mandates, and to provide enforceable requirements for the performance and completion of such projects.

In adopting guidelines and requirements for SEPs, the Commission joins other federal and State regulatory agencies that have adopted policies for the use of SEPs in resolving administrative enforcement actions. For example, the United States Environmental Protection Agency first adopted a SEP Policy in 1998 applicable to violations of certain federal environmental statutes. Similarly, the State Water Resources Control Board first adopted a SEP policy in 2009, which was amended in 2017, and the Department of Toxic Substances Control adopted a SEP policy in 2016. *See* State Water Resources Control Board, Policy on Supplemental Environmental Projects, December 5, 2017 ("SWRCB SEP Policy"); Department of Toxic Substances Control, Official Policy Number DTSC-OP-035, Supplemental Environmental Projects, May 5, 2016 ("DTSC SEP Policy").

In 2015, the Legislature enacted Public Resources Code Section 71118, which requires each board, department, or office within the California Environmental Protection Agency to establish a policy on SEPs that benefit disadvantaged communities. Pub. Res. Code § 71118 (b). This statute does not apply to the Commission, which is an agency within the California Natural Resources Agency, not the California Environmental Protection Agency. Nevertheless, Public Resources Code Section 71118 reflects the Legislature's recognition of the importance and desirability of state environmental regulatory agencies adopting policies for the use of a SEP in partial resolution of an enforcement action. Consistent with Public Resources Code Section 71118, the Commission's adoption of guidelines and requirements for a SEP is necessary to ensure consistency, transparency, and fairness in the use of SEPs in partial resolution of Commission enforcement actions.

Introduction

The Introduction is necessary to explain that the Policy addresses the assessment of administrative civil penalties as authorized by Government Code Section 66641.5(e), and that Government Code Section 66641.9(a) sets forth the factors to be considered by the Commission in determining the amount of administrative civil liability.

The Introduction is necessary to state that the Policy consists of two parts: (1) Part I, Penalty Calculation Methodology; and (2) Part II, Supplemental Environmental Projects. The Introduction is also necessary to state that the goal of the Policy to promote the enforcement goals of consistency, transparency, fairness, and deterrence of noncompliance.

The Introduction is necessary to describe the applicability of the Policy by stating that the Executive Director shall apply the Penalty Calculation Methodology set forth in Part I of the Policy in proposing an administrative civil penalty amount for all violations in a complaint for administrative civil liability and that the Commission shall apply Part I of the Policy in establishing an administrative civil penalty amount for all violations in an order setting administrative civil liability. The Introduction is also necessary to state that Part II of the Policy establishes guidelines and requirements that are applicable to a supplemental environmental project, which is an environmentally beneficial project that a violator agrees to undertake and complete in partial

resolution of an enforcement action to offset a portion of the administrative civil penalty that would otherwise apply as a result of the violation(s).

Part I - Penalty Calculation Methodology

As noted above, the Penalty Calculation Methodology set forth in Part I of the Policy is necessary to establish an administrative civil penalty assessment methodology that provides for consideration of the statutory factors set forth in Government Code Section 66641.9(a) and creates a transparent, fair, and consistent approach to the determination and imposition of appropriate administrative civil penalties for violations. The Penalty Calculation Methodology is modeled on the methodologies set forth in the administrative penalty policies that have been adopted and successfully implemented by the State Water Resources Control Board and the Department of Toxic Substances Control for determining administrative penalties under the statutes administered by those agencies. Modeling the Penalty Calculation Methodology on the SWRCB Penalty Policy and the DTSC Penalty Policy is necessary and appropriate because those agencies and their administrative penalty policies address similar subject matter to the Commission – the enforcement of laws, regulations, and permits to protect the environment and public health and safety. As summarized below, there are six steps to the Penalty Calculation Methodology.

Step 1. Determine the total initial base penalty amount for each violation. The initial base penalty is determined by evaluating: (a) the gravity of harm of the violation; and (b) the violation's extent of deviation from the applicable requirement at issue. Government Code Section 66641.9(a) requires consideration of the gravity and extent of a violation in determining the amount of administrative civil penalties for a violation. Requiring consideration of these factors is necessary to ensure that the Penalty Calculation Policy is consistent with Section 66641.9(a). In determining the initial base penalty amount based on evaluations of the gravity of harm of a violation and the violation's extent of deviation from the applicable requirement, Step 1 is modeled on the SWRCB Penalty Policy and the DTSC Penalty Policy. Both of those administrative penalty policies start with an assessment of the actual or potential harm associated with a violation and consideration of the extent of deviation from the applicable requirement to determine an initial base penalty amount. Evaluating both gravity of harm and extent of deviation from the applicable requirement in Step 1 is necessary because, as reflected by the SWRCB Penalty Policy and the DTSC Penalty Policy, the actual or potential harm caused by a violation and the violation's extent of deviation from the applicable requirement are the most important considerations in determining an appropriate administrative penalty.

Based on the evaluations of gravity of harm and extent of deviation from the applicable requirement, Table 1 is used to determine the initial base penalty amount for each violation. The initial base penalty amount is multiplied by the number of days that the violation has persisted to determine the total initial base penalty for the violation.

In evaluating gravity of harm, the Policy distinguishes between two types of violations: (1) physical violations (*i.e.,* unauthorized fill, use, or activity or failure to perform work, construct

improvements, or provide public access as required by a Commission permit); and (2) paper violations (*i.e.,* failure to submit a document as required by law or a Commission permit).

For physical violations, gravity of harm is determined using a six-factor scoring system to quantify: (1) habitat value; (2) durability; (3) toxicity; (4) size; (5) nature of violation; and (6) visibility. Consideration of each of these factors is necessary in determining gravity of harm because they relate directly to the resources to be protected by the Commission through ensuring compliance with the statutes administered and permits issued by the Commission. Those resources include San Francisco Bay, including its water quality, habitat for aquatic organisms and wildlife, and shoreline, as well as public access to the Bay and its shoreline. Habitat value considers the physical and biological resources at the location of a violation; a violation occurring in high-quality, productive habitat will have a greater gravity of harm than a violation occurring in degraded habitat. Durability considers the duration of a violation; a violation involving a permanent or long-lasting activity will have a greater gravity of harm than a transitory or easily removed activity. Toxicity considers the hazards or risks of damage to human health, plants, wildlife, or other biological resources associated with a violation; a violation presenting high human health or safety hazards, such as the placement of contaminated fill in the Bay, will have a greater gravity of harm than a violation involving no or low human health or safety hazards. Size considers the area, volume, and locations affected by a violation; a violation extending over a large area or throughout a site will have a greater gravity of harm than a violation involving a small area or a single location. Nature of violation considers whether the violation can be resolved by compliance with an existing permit or can be authorized by issuance of a permit or permit amendment; a violation that cannot be permitted in a manner consistent with the Commission's laws and policies will have a greater gravity of harm than a violation that can be resolved by compliance with an existing permit. Visibility considers the conspicuousness of the violation; a violation that is highly visible to the public or that impacts many people will have a greater gravity of harm than a violation that is not highly visible to the public or that impacts few people.

The scores for each of the six factors are added to produce a final gravity of harm score for the violation and to categorize the violation's gravity of harm as "Major," "Moderate," or "Minor." These categories are described in the policy. In brief, violations with a high level of actual or potential harm to the Bay's resources or public access are Major; conversely, violations involving minor or minimal harm to the Bay's resources or public access are Minor.

For paper violations, gravity of harm, and the categorization of a violation as either "Moderate" or "Minor," is determined based on the type of document the submission of which is required by a Commission permit. No paper violations are categorized as "Major."

Evaluating the extent of deviation from an applicable requirement involves, for both physical violations and paper violations, considering the extent to which a violation deviates from the specific requirement of law (statute or regulation) or the term or condition of a Commission permit. The categories of extent of deviation from an applicable requirement are "Major," "Moderate," or "Minor." These categories are described in the policy. In brief, violations where the applicable requirement was completely ignored involve a Major deviation from the legal

requirement; conversely, violations that involve activities that deviate from the applicable requirement only to a small or minimal extent involve a Minor deviation from the legal requirement.

Based on the evaluations of gravity of harm and extent of deviation from an applicable requirement, Table 1 is used to determine the initial base penalty amount for a violation. Table 1 consists of a matrix containing three rows for Gravity of Harm categorized as "Major," "Moderate," or "Minor," and three columns for Extent of Deviation from Legal Requirement also categorized as "Major," "Moderate," or "Minor." The dollar amounts in the cells of Table 1 are based on the statutory penalty range of between $10 and $2,000 per day per violation. The initial penalty amounts in Table 1 range from a low of $10-249 for a violation with a Minor Gravity of Harm and Minor Extent of Deviation to a high of $1600-2000 for a violation with a Major Gravity of Harm and Major Extent of Deviation.

After the initial base penalty amount is determined using Table 1, that amount is multiplied by the number of days that the violation has persisted to determine the total initial base penalty amount for the violation.

Steps 2, 3, and 4. After the total initial base penalty amount is determined, the next steps in the Penalty Calculation Methodology are to consider whether to adjust to the total base penalty amount for three factors specific to the violator: Step 2, the violator's degree of culpability for the violation; Step 3, any history of violations by the violator; Step 4, any voluntary removal or resolution efforts and cooperation by the violator. Government Code Section 66641.9(a) requires consideration of each of these factors in determining the amount of administrative civil penalties for a violation. Requiring consideration of each of these factors is necessary to ensure that the Penalty Calculation Policy is consistent with Section 66641.9(a). Steps 2, 3, and 4 are modeled on the SWRCB Penalty Policy which provides for potential adjustment of an administrative penalty based on consideration of three factors related to a violator's conduct: the violator's degree of culpability; any prior history of violations by the violator within the past five years; and the violator's voluntary efforts to address the violation and/or cooperate with regulatory authorities in returning to compliance.

Step 2. The total initial base penalty amount may be adjusted upward or downward by as much as 25% based on the violator's degree of culpability prior to or when engaging in the violation. An upward adjustment shall be made for intentional or grossly negligent violations. A downward adjustment shall be made for accidental violations or situations where the violation was outside of the violator's control and the violator took measures that exceeded the standard of care expected of a reasonably prudent person to avoid or minimize a violation. No adjustment shall be made when a violator acted as a reasonable and prudent person would have. The 25% adjustment figure is modeled on the SWRCB Penalty Policy which allows an upward adjustment of as much as 50% or a downward adjustment of as much as 25% for a violator's degree of culpability. An adjustment of the total initial base amount upward or downward by as much as 25% is necessary and appropriate

because a violator's degree of culpability is an important penalty factor within the control of the violator that is related to the enforcement goals of deterrence of violations and fairness. Where a violation is the result of intentional or grossly negligent conduct, it is appropriate to increase the total initial base penalty amount by as much as 25% due to the violator's high degree of culpability. On the other hand, where a violation is the result of an accident caused by circumstances outside the violator's control, it is appropriate to decrease the total initial base penalty amount by as much as 25%.

Step 3. The total initial base penalty shall be adjusted upward by as much as 10% for a history of prior violations within the past five years. There shall be no downward adjustment where there is no history of violations because regulated entities are expected to comply with the Commission's laws and permits. The 10% adjustment figure is modeled on the SWRCB Penalty Policy which allows an upward adjustment of as much as 10% for a history of prior violations within the past five years. An upward adjustment of the total initial base penalty amount by as much as 10% is necessary and appropriate because a violator's history of prior violations is a relevant penalty factor related to the enforcement goal of deterrence of violations, but it is a factor of lesser significance than either a violator's degree of culpability or a violator's voluntary resolution and cooperation efforts. Consideration of a five-year period of prior violations is necessary because relatively recent violations, within the past five years, are more relevant than older violations to a violator's current conduct with respect to compliance or noncompliance with applicable requirements and because evidence related to violations within the past five years generally is more readily available and more reliable than evidence regarding older violations.

Step 4. The total initial base penalty may be adjusted upward or downward by as much as 25% based on the violator's cooperation and resolution efforts. Penalties shall be adjusted downward where a violator has taken extraordinary actions to cooperate with an investigation and to resolve or mitigate the impacts of the unauthorized activity. Penalties shall be adjusted upward where a violator has delayed compliance or created obstacles to achieving compliance. No adjustment shall be made when a violator is has responded to a violation or cooperated with Commission staff as a reasonable and prudent person would have. The 25% adjustment figure is modeled on the SWRCB Penalty Policy which allows an upward adjustment of as much as 50% or a downward adjustment of as much as 25% for a violator's voluntary efforts to address a violation and/or cooperation with regulatory authorities to return to compliance. An adjustment of the total initial base amount upward or downward by as much as 25% is necessary and appropriate because a violator's voluntary efforts to resolve a violation and cooperate with the Commission or its staff is an important penalty factor within the control of the violator that is related to the enforcement goals of deterrence of violations and fairness. Where a violator delays compliance and refuses to cooperate with the agency, it is appropriate to increase the total initial base penalty amount by as much as 25% due to the violator's recalcitrant conduct. On the other hand, where a violator

voluntarily resolves a violation and cooperates with the agency to mitigate the impacts associated with the violation, it is appropriate to decrease the total base penalty amount by as much as 25%.

Step 5. The total base penalty amount is determined by calculating the sum for all violations of the total initial base penalty amount for each violation (*i.e.,* the initial base penalty amount for the violation multiplied by the number of days of violation) multiplied for each violation by the percentages of any adjustments for the violator's culpability, history of violations, and voluntary efforts to resolve the violation.

Step 6. After the total base penalty amount for all violations is determined, the final step in the Penalty Calculation Methodology is to consider whether to adjust the total base penalty amount based on four additional factors and to determine the final penalty amount. Depending on the available information, the Executive Director may recommend adjusting or the Commission may adjust the total base penalty amount based on consideration of the following factors: (a) any economic benefit to the violator; (b) the violator's ability to pay or continue in business; (c) costs to the State in pursuing the enforcement action; (d) other factors as justice may require. Government Code Section 66641.9(a) requires consideration of each of these factors in determining the amount of administrative civil penalties for a violation. Requiring consideration of each of these factors is necessary to ensure that the Penalty Calculation Policy is consistent with Section 66641.9(a).

Consideration of any economic benefit to the violator from the activity or failure to act that constitutes a violation is necessary to ensure that entities that voluntarily incur the costs of regulatory compliance are not placed at a competitive disadvantage in comparison to entities that fail to comply. Thus, consideration of any economic benefit to the violator promotes the enforcement goals of deterrence of violations and fairness. When sufficient information is available to determine or reasonably calculate the economic benefit of a violation (or multiple related violations), the economic benefit shall be compared to the total initial base penalty amount. If the total initial base penalty amount is less than the determined or estimated economic benefit, the total initial base penalty amount for the violation (or multiple related violations) shall be adjusted to be set at a sum that is 10% higher than the economic benefit to ensure that civil penalties are not construed as a cost of doing business and are assessed at an amount sufficient to deter future violations. Adjusting the total initial base penalty amount to a sum that is 10% higher than the economic benefit is modeled on the SWRCB Penalty Policy which provides that administrative penalties should be at least 10% higher than the economic benefit resulting from a violation. Adjusting the total initial base penalty amount to be 10% higher than the economic benefit is necessary to ensure that a violator does not receive economic benefit from the violation, to deter violations by others, and to promote fairness to entities that voluntarily comply.

Consideration of a violator's ability to pay administrative penalties and/or ability to continue in business is necessary to avoid undue financial burden to violators in appropriate cases, even though the Commission is under no obligation to ensure that a violator is able to pay such penalties or continue in business. Because information relevant to these considerations is exclusively in the possession and control of the violator, the potential inability to pay or a potential effect on the violator's ability to continue in business shall be considered only if the violator raises these issues as a defense to a complaint and submits relevant supporting factual information.

Consideration of costs to the state is necessary to enable the Commission to recover the costs of investigating violations and pursuing an enforcement action when it is feasible to do so. If the Executive Director includes costs of investigating or pursuing an enforcement action in a complaint, the costs will be itemized by documenting the work performed, the time spent on the task, and the hourly rate for each staff member involved.

Consideration of other factors as justice may require is necessary to allow the Commission to adjust the penalty amount if it determines that the calculated penalty amount is inappropriate for some specified reason, such as if the violator identifies and provides relevant information not considered under the other criteria listed in the Penalty Calculation Methodology or if the calculated penalty amount is substantially disproportionate to the penalty assessment for similar violations made in the recent past using the policy.

When relevant information is available, the Executive Director or Commission shall consider each of these factors, but the Commission is not required by Government Code Section 66641.9(a) to adjust a penalty in any particular manner, percentage, or amount based on any or all of them. When the total base penalty amount is adjusted based on consideration of any of these factors, specific findings as to the applicable factors shall be proposed by the Executive Director and made by the Commission.

The final penalty amount shall be determined by making any appropriate adjustments to the total base penalty amount for all violations based on consideration of these four factors, provided that the final penalty amount for each violation shall not exceed the statutory minimum of $30,000 per violation.

Part II - Supplemental Environmental Projects

A supplemental environmental project ("SEP") is an environmentally beneficial project that a violator voluntarily agrees to undertake and complete in partial resolution of an enforcement action, which the violator is not otherwise legally required to perform and for which the Commission agrees to offset a portion of the monetary civil penalty that would otherwise apply as a result of the violation. As noted above, Part II, Supplement Environmental Projects, is necessary to recognize the value in using a violator's performance of a SEP as an alternative to the violator's payment of a portion of the administrative civil penalties imposed for a violation or violations while

establishing guidelines and requirements for Commission approval of such a project to ensure that the project provides the expected benefits.

Section A of Part II is an Introduction that is necessary to define the term SEP. The Introduction is also necessary to provide notice to the regulated community that, as a matter of policy, while SEPs may be useful in the resolution of enforcement actions, the funding of SEPs is not a primary goal of the enforcement program. The Introduction makes it clear that the decision to accept a proposed SEP, and to determine the amount or percentage of a total administrative civil penalty that may be offset by a SEP, are within the Commission's sole discretion and will depend on the specific facts of a particular case. The statements in the Introduction regarding the Commission's discretion to include a SEP in resolution of an enforcement action are modeled on similar statements regarding agency discretion to accept a SEP in the SWRCB SEP Policy and the DTSC SEP Policy. Reserving the Commission's discretion on this issue is necessary because there may be situations where the Commission determines that a SEP which satisfies the provisions of the policy should not be accepted, such is if the violator committed numerous intentional violations and was subsequently recalcitrant in resolving the violations and refused to cooperate. Similarly, the Commission may disagree that a SEP proposed by a violator satisfies the provisions of the policy, such as by having an insufficient nexus to the Commission's statutory mandate to protect the Bay's resources and ensure public access to the Bay. Because the funding of a SEP is not a primary goal of the Commission's enforcement program, reserving the Commission's discretion to accept a SEP is necessary to ensure that settlement negotiations with violators do not turn into negotiations focused on what SEP project would be acceptable and the value or cost of a proposed SEP in relation to the proposed penalty.

Section B of Part II contains a set of guidelines that apply to SEPs. The guidelines are necessary to: identify the categories of projects that are acceptable as SEPs consistent with the Commission's statutory mandate; specify that the amount of the penalty to be offset by a SEP shall not exceed 50% of the total penalty amount that the violator is required to pay for the violation(s); state that a SEP must be enforceable pursuant to a stipulated order setting administrative civil liability or a settlement agreement; identify the Commission's preferences for a SEP; and provide examples of projects that are not acceptable as SEPs.

The SEP guidelines are modeled on the DTSC SEP Policy, which includes a section on SEP project guidelines. In addition, both the DTSC SEP Policy and the SWRCB SEP Policy identify the types of projects that are acceptable as SEPs consistent with the statutory mandates of those agencies, and the SWRCB Policy also identifies the types of projects that are not acceptable as SEPs.

The SEP guideline stating that a SEP shall have an adequate nexus to the Commission's statutory mandate to protect the Bay's resources and public access to the Bay is necessary to ensure that any SEP is performed in the Commission's jurisdiction and protects, restores, or enhances the Bay's resources or public access to the Bay in a manner consistent with the laws and policies administered by the Commission. The SEP guideline stating that there shall be an adequate nexus between the nature or location of the violation(s) and the nature or location of the SEP is necessary to ensure that a SEP provides an environmental benefit that is similar in nature to the resources

impacted by the violation(s) or located in reasonably proximity to the location impacted by the violation(s). The DTSC SEP Policy similarly requires that a SEP have an adequate nexus to the regulatory responsibilities of DTSC.

The SEP guideline stating that the amount of the penalty to be offset by a SEP shall not exceed 50% of the total penalty that the violator is required to pay is necessary to allow a sufficiently high percentage penalty offset so that adequate funds are available to fund an environmentally beneficially project, but not so high a percentage penalty offset that a violator is relieved of its obligation to pay a significant portion of its liability in the form of an administrative penalty. The Commission considered setting the penalty offset percentage as low as 25% and as high as 100% before deciding on 50%. In making this decision, the Commission looked to two statutes that indicate that where the Legislature has authorized SEPs, it has established a 50% limitation on the penalty offset. *See* Pub. Res. Code § 71118(b)(2) (requiring each agency within Cal EPA to establish a SEP policy allowing the amount of a SEP to be up to 50 percent of the enforcement action); Water Code § 13399.35 (regional water quality control board may allow a person to reduce penalties by up to 50% by undertaking a SEP). Consistent with these statutes, both the DTSC SEP Policy and the SWRCB SEP Policy allow a maximum offset of 50% of a penalty for a SEP. The maximum 50% penalty offset is necessary because as a matter of policy, SEPs are to be allowed only in partial, not full, resolution of a penalty to promote the enforcement goal of deterrence and to prevent SEPs from becoming viewed as a cost of doing business.

The SEP guidelines stating that the Commission shall never compromise the stringency or timeliness of a regulatory requirement in exchange for a SEP and that a SEP cannot be used to satisfy the Commission's or another government agency's statutory or regulatory requirements are necessary to maintain the integrity of the regulatory process by ensuring that a violator complies with all applicable requirements and does obtain an unfair advantage in relation to other entities that voluntary comply in a timely manner. The SEP guideline stating that a SEP shall not directly financially benefit the Commission's functions, its staff, or family members of its staff is also necessary to maintain the integrity of the regulatory process and to avoid any claim of potential conflict of interest associated with acceptance of a SEP.

Section C of Part II sets forth a set of requirements for any stipulated order or a settlement agreement authorizing a SEP. These requirements are necessary to ensure that violator's agreement to perform a SEP is enforceable and results in completion of the project. More specifically, the requirements are necessary to ensure that any stipulated order or a settlement agreement authorizing a SEP: accurately and completely describes the SEP; addresses how a SEP will comply with the California Environmental Quality Act; requires that the SEP be completed within 36 months, unless the Executive Director grants an extension for good cause; requires that any funds intended for the SEP shall be spent on the specific, defined project; states that the penalty offset amount that will be satisfied by performing the SEP shall be treated as a suspended civil penalty, and that if the SEP is not fully implemented, the Commission shall be entitled to recover the full amount of the suspended penalty; and requires the violator or third-party performing the SEP to provide a full accounting of project expenditures, periodic reporting on

agreed upon SEP performance milestones, and a final completion report certifying completion of the SEP in accordance with the terms of the order or agreement.

The requirements for stipulated orders or settlement agreements authorizing a SEP are modeled on the DTSC SEP Policy and the SWRCB SEP Policy, which both include sections listing similar requirements for settlements or stipulated orders authorizing a SEP.

The requirement that all SEP funds shall be expended, and a SEP completed, within 36 months of Commission approval is necessary to ensure that a violator diligently pursues and completes a SEP in a timely manner, so that the environmental benefits of the SEP are realized, while allowing adequate time for any necessary environmental review and permitting of the SEP and for performance of the project. The Executive Director is authorized to grant an extension of the 36-month timeframe for good cause shown as to why completion of a SEP has been delayed.

The requirement that the Commission shall be entitled to recover the full amount of the suspended penalty if a SEP is not fully implemented in accordance with the terms of the order or agreement is necessary to ensure that the Commission recovers the full amount of the imposed penalty, and that the violator does not receive an economic benefit, if the violator fails to complete the SEP. Both the DTSC SEP Policy and the SWRCB SEP Policy contain similar requirements providing for the agency to recover the full amount of a suspended penalty if a SEP is not completed. The requirement that, upon written demand by or on behalf of the Commission, the violator pay full amount of the suspended penalty within 30 days is necessary to provide the violator with sufficient time to submit payment upon receiving a payment demand from the Commission. Requiring payment of the suspended penalty amount within 30 days is consistent with Government Code Section 66641.6(d), which requires payment of civil penalties within 30 days of issuance of a Commission order setting administrative liability.

The requirement that whenever the violator or third-party performing a SEP publicizes the SEP, it shall state in a prominent manner that the project is being (or has been) has been undertaken as part of a resolution of a Commission enforcement action is necessary to prevent a violator from taking credit for a SEP without also acknowledging that the project was conducted in resolution of a Commission enforcement action against the violator. This requirement furthers the enforcement goals of deterrence of violations and fairness. Both the DTSC SEP Policy and the SWRCB SEP Policy contain similar requirements that any publicity relating to a SEP state that the project was undertaken in resolution of an agency enforcement action.

Authority and Reference Note

The amendments adding Appendix J including an Authority and Reference note with appropriate citations. The Authority citation to Government Code Section 66632(f) is necessary because that section authorizes the Commission to adopt regulations to enable it to carry out it functions under the MPA. The Authority citation to Public Resources Code Section 29201(e) is necessary because that section authorizes the Commission to adopt regulations consistent with the SMPA. The Reference citation to Government Code Sections 11415.60 is necessary because that section

provides that an agency may formulate and issue a decision by settlement without conducting an adjudicative proceeding and that a settlement is subject to any necessary agency approval. The Reference citation to Government Code Section 66641.5(e) is necessary because that section authorizes the Commission to impose administrative civil liability. The Reference citation to Government Code Section 66641.6 is necessary because that section authorizes the Executive Director to issue a complaint for, and the Commission to adopt an order setting, administrative civil liability. The Reference citations to Public Resources Code Sections 29610 and 29611 are necessary because those sections authorize the imposition of penalties under the SMPA.

Economic Impact Assessment

This economic impact assessment is based on and presents information contained in the Economic and Fiscal Impact Statement (Form STD 399), including a supplement thereto, which has been approved by the California Natural Resources Agency and the Department of Finance and is included in the rulemaking file.

Businesses and individuals that comply with the law and refrain from undertaking actions that are inconsistent with the terms and conditions of any permit issued by the Commission will not be subject to an enforcement action under the Commission's regulations and, therefore, will not incur any costs, including potential administrative civil liability or fines, to comply with the proposed amendments to the Commission's enforcement procedures regulations.

The number of businesses impacted by the amendments will depend on how many businesses are subject to an enforcement action by the Commission because they have violated the terms of a permit issued by the Commission or conducted activities in the Commission's jurisdiction in violation of the MPA or SMPA. Over the three-year period 2017-2019, the Commission's staff opened an annual average of approximately 60 enforcement investigations, which were approximately equally divided between public agencies (state or local government) and private parties. Based on these figures, it is estimated that an annual average of approximately 30 private parties (individuals or businesses) will potentially be impacted by the amendments.

Business and individuals may incur costs to correct violations of a Commission permit, the MPA, and/or the SMPA, as well as penalties or fines imposed by the Commission for violations in an amount that will be dependent on the facts of a particular case, including the nature, extent, and number of violations, the time that it takes for the business or individual to correct the violations, and other factors. However, the amendments primarily concern procedural matters and will not significantly increase the costs incurred by violators. This is because businesses and individuals are currently required by law to correct violations and because the MPA, SMPA, and the existing enforcement procedures regulations already authorize penalties or fines for violations of applicable requirements. The amendments incrementally increase the standardized fines for certain categories of violations, but the increased costs to violators, while not quantifiable, will not be significant because the MPA limits the penalty for any violation to a maximum of $30,000.

For the foregoing reasons, the amendments to the Commission's enforcement procedures regulations will not affect the creation or elimination of jobs within California. The amendments also will not affect the creation of new businesses, the elimination of existing businesses within California, or the expansion of businesses currently doing business within California.

The benefits of the amendments to the Commission's enforcement regulations are primarily non-monetary. The benefits include improved transparency, consistency, and fairness in the Commission's enforcement process and a strengthened deterrent effect of the enforcement program. The benefits also include increased compliance with the Commission's laws and policies and with the permits issued by the Commission, including requirements to provide and maintain public access and public access improvements, and improved environmental protection of San Francisco Bay and its shoreline and the Suisun Marsh, including preventing the unauthorized placement of fill in the Bay. By improving environmental protection and compliance with public access requirements, the amendments will also benefit the health and welfare of California residents.

Technical Studies and Other Materials Relied Upon.

The Commission relied on the following report, regulations, and policies in developing the amendments to its enforcement regulations. These documents are included in the rulemaking file and are available for review upon request.

1. California State Auditor, Audit Report No. 2018-120, San Francisco Bay Conservation and Development Commission, May 2019.
2. State Water Resources Control Board, Water Quality Enforcement Policy, Section VI., Monetary Assessments in Administrative Civil Liability (ACL) Actions, April 4, 2017.
3. Department of Toxic Substances Control, Regulations governing the assessment of administrative penalties, 22 C.C.R. §§ 66272.60 – 66272.69.
4. State Water Resources Control Board, Policy on Supplemental Environmental Projects, adopted December 5, 2017.
5. Department of Toxic Substances Control, Official Policy Number DTSC-OP-035, Supplemental Environmental Projects, adopted May 5, 2016.